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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FERRIS JACOB ALEXANDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

NOTICE OF MOTION PURSUANT TO 28 UNITED STATES CODE, SECTION 2255

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of JAMES M. LA ROSSA, duly sworn to on the 19th day of January, 1972, the undersigned will move this Court before the Honorable Lloyd F. MacMahon, United States District Judge, United States District Court for the Southern District of New York at the United States Courthouse, Foley Square, New York, New York, at a time and place designated by the Court, for an order pursuant to Title 28, United States Code, Section 2255, vacating the conviction entered against the plaintiff in the proceeding entitled *United States of America v. Samuel R. Manarite, et al,* 69 C.R. 747.

Dated: New York, New York January 19, 1972.

Yours, etc.

JAMES M. LA ROSSA
Attorney for Plaintiff
115 Broadway
New York, N. Y. 10006
ROBERT J. MILAVITZ, ESQ.
1255 Dain Tower
Minneapolis, Minnesota
Of Counsel

To:
HON. WHITNEY NORTH SEYMOUR, JR.
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FERRIS JACOB ALEXANDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT

State of New York
County of New York—ss.

JAMES M. LA ROSSA, being duly sworn, deposes and says:

1. That he is an attorney duly licensed to practice law in the State of New York, with offices at 115 Broadway, New York, New York.

2. That this affidavit is made upon information and belief, except as to those matters wherein it is stated that your deponent has actual knowledge thereof.

3. That he represents Ferris Jacob Alexander, the Petitioner in the above captioned action.

4. The Petitioner is presently incarcerated at the Federal Correctional Facility at Sandstone, Minnesota. Petitioner surrendered to Federal custody on January 4, 1972 to serve a prison term of eighteen months imposed by this Court upon a judgment of conviction of violating the Federal Obscenity Laws, i.e. Title 18, United States Code, Section 1465, and conspiracy in violation of Title 18, United States Code, Section 371.

5. That this Affidavit is made in support of Petitioner's motion to vacate his judgment of conviction, docketed as 69 C.R. 747, pursuant to Title 28, United States Code, Section 2255. Petitioner respectfully submits that the conviction and sentence pursuant to which Petitioner is being detained was imposed in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, the right to confront witnesses provision of the Sixth Amendment to the Constitution of the United States, and the right to the assistance of counsel under the Sixth Amendment.

6. The facts showing these Constitutional violations are as follows:

On October 27, 1969, Petitioner was indicted along with fifteen other named defendants, including his brother, Edward Jacob Alexander, on charges of violating the Federal Obscenity Laws and conspiracy to violate the same. Shortly after his arraignment on this Indictment, the Petitioner, with his brother, retained Herald Price Fahringer of Buffalo, New York, to represent them in this criminal litigation. Fahringer, prior to trial, represented two other co-defendants, Paul Wolf and Max Bornstein. Wolf failed to appear at the time the matter was called for trial and remains a fugitive. Bornstein

secured the representation of another attorney who ultimately gained an acquittal for his client.

Petitoner, prior to trial, conferred with Mr. Fahringer and revealed the extent of his participation in the alleged scheme. At that meeting, Petitioner's brother, Edward Jacob Alexander, similarly disclosed what his position was with respect to the acts alleged. At the time of these initial meetings Petitioner was unaware of the legal implications of the fact that the positions taken by he and his brother were inconsistent and unsimilar. Mr. Fahringer apparently failed at that time to bare the fact that a conflict of interest existed between Petitioner and his brother. Further, it was made known to Mr. Fahringer at these meetings that the testimony of the Petitioner and his brother would strongly tend to implicate co-defendants Wolf and Bornstein. Petitioner was not advised, and at that time did not understand, that counsel had a subconscious loyalty and sense of responsibility toward Wolf and Bornstein, although no longer formally representing them.

At the trial of the action herein, one Bruce Valentine, named as a co-conspirator but not a defendant, gave testimony which implicated the Petitioner in the alleged scheme to transport obscene materials. It should be noted that Bruce Valentine was the sole witness to implicate the Petitioner. The Petitioner's involvement in the conspiracy and two substantive acts on which he was convicted, was based upon Valentine's testimony of meetings with Petitiorer in New York City and deliveries to him in Minneapolis, Minnesota. Valentine's Grand Jury testimony evidenced the fact that he was somewhat confused when distinguishing the activity of the two brothers. However, his testimony remains that when in Minnesota he met with the Petitioner in the course of delivering these printed materials. It is the Petitioner's position, as it has consistently

been since Valentine testified, that it was not he that Valentine met on his trips to Minnesota. The thin thread that linked the Petitioner to the conspiracy could easily have been broken if Petitioner had demonstrated that he was never present at a meeting in New York City and that it was not he with whom the witness met.

Petitioner bases his claim of deprivation of counsel on the fact that Mr. Fahringer's loyalty was divided. It should be noted that the Petitioner does not allege that Mr. Fahringer in any way violated his professional oath. However, the fact that he represented four of the co-defendants through at least the motion stages of the proceedings, rendered him incapable of devoting his full efforts to the Petitioner. Edward Jacob Alexander's willingness to waive his Fifth Amendment privilege and testify on behalf of Petitioner in an attempt to reveal the truth, and Petitioner's repeated demands to testify in his own behalf, indicates, it is submitted, that Mr. Fahringer was at least subconsciously concerned with more than the position of the Petitioner.

Petitioner asserts that counsel's rejection of every effort to have he and his brother testify went well beyond the scope of trial strategy. Petitioner, who has never been previously convicted of a crime, was not told by Mr. Fahringer that it was the Petitioner's determination as to whether he would testify. The conflict of interest between Petitioner and his brother is now clear. This conflict is further compounded by the conflict of interest with Bornstein and Wolf. Although the latter is not apparent on the face of the record, Petitioner alleges that a hearing on this Petition would clearly reveal this divided loyalty.

WHEREFORE, it is respectfully requested that in view of the foreoing facts, Petitioner's Judgment of Conviction

should be vacated or in the alternative, a hearing be held pursuant to Title 28, United States Code, Section 2255.

JAMES M. LA ROSSA

Sworn to before me this 19th day of January, 1972.—Lenore Berg, Commissioner of Deeds, City of New York No. 2-1352. Certificate filed in New York County. Commission expires Aug. 2, 19—.

(Title of Cause)

AFFIDAVIT IN OPPOSITION

Joel M. Friedman, being duly sworn, deposes and says that:

1. I am a Special Attorney with the United States Department of Justice, Criminal Division, Organized Crime and Racketeering Section, Joint Strike Force for the Southern District of New York, and as the attorney assigned to this case am fully familiar with all the facts pertaining thereto.

2. This affidavit is submitted in opposition to the motion of defendant Ferris Jacob Alexander pursuant to 28 U.S.C. 2255, sworn to on January 19, 1972.

3. On October 27, 1969, Indictment No. 69 Cr. 747 was returned in the Southern District of New York.

4. Shortly after the filing of the indictment, Mr. Harold Price Fahringer filed an appearance for Max Bornstein and Paul Wolf. Copy attached as Exhibit A and incorporated herein.

5. On or about January 7, 1970, Keith D. Kennedy, filed an appearance for Edward J. Alexander and Ferris J. Alexander. Copy attached as Exhibit B and incorporated herein.

6. On March 12, 1970 the following colloquy occurred be-

tween Mr. Fahringer and the Court. Copy attached as Exhibit C and incorporated herein.

7. On or about October 1, 1970, Melvin N. Fine filed an appearance for Max Bornstein. Copy attached as Exhibit D and incorporated herein.

8. On September 20, 1970, Herald Price Fahringer sent a letter to Judge MacMahon. Copy attached as Exhibit E and incorporated herein.

9. On September 26, 1970, Herald Price Fahringer sent a letter to Judge MacMahon. Copy attached as Exhibit F and incorporated herein.

10. Nowhere in the record is there an indication that Mr. Kennedy had withdrawn from the case.

11. On October 5, 1970, the Government severed its case against Edward Jacob Alexander and went to trial against Ferris Jacob Alexander and seven other defendants. Max Bornstein was present at trial and represented by Max Fine, Paul Wolf failed to appear for trial and was later indicted for bail jumping.

12. On October 5, 1970, Mr. Fahringer made the following statement. Copy of transcript attached and incorporated herein as Exhibit G. Mr. Milavitz and Mr. Fahringer represented Mr. Alexander at trial.

13. Apparently from on or about October 5, 1970 until the present Mr. Robert J. Milavitz represented Ferris Jacob Alexander. Mr. Fahringer also represented Ferris Jacob Alexander at trial and continued to represent him until January 6, 1972.

14. On or about December 22, 1969, James La Rossa filed an appearance for Richard Portella and Carol Portella. Mr. La Rossa or attorneys in his firm represented Mr. Portella as late as Mr. Portella's surrender on January 6, 1972.

15. Ferris Jacob Alexander's motion is frivolous on its face and should be dismissed without hearing.

16. I spoke to Mr. Fahringer on January 27, 1972 by telephone and he informed me that at about the time that he wrote the letters (Exhibit E and F of this affidavit) it had become likely that he would defend one of the Alexanders and therefore he called them into his office at Buffalo and instructed them that he definitely would defend one and only one of them at trial if they both went to trial.

17. The submission of this motion on the part of Mr. La Rossa insults the intelligence of this court. Apparently Mr. La Rossa would seek to overturn Mr. Alexander's conviction on the basis of an alleged conflict of interest which if it existed would also exist to the same degree in Mr. La Rossa's present representation of Mr. Alexander. If there were any merit to this motion it would seem appropriate for Mr. La Rossa to withdraw rather than cause the court to expend further resources on another 2255 based upon Mr. La Rossa's alleged conflict of interest, due to his present joint representation of Mr. Portella and Mr. Alexander.

18. Despite defendant Alexander's allegations to the contrary, there was substantial documentary evidence, and testimony by Mr. Del Rosso and Agent Anderson in addition to the testimony of Mr. Valentine, that implicated him at trial.

Wherefore, it is respectfully requested that in view of the foregoing facts Petitioner's motion be dismissed as frivolous, without a hearing.

JOEL M. FRIEDMAN
Special Attorney
Joint Strike Force

Subscribed and sworn to before me this —— day of ——, 1972.

JMF:pas

USA-33s-187
Rev. 2/4/66

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
vs.
SAMUEL P. MAHARITZ et al.

To: John J. Olear, Jr., Clerk, United States District Court, Southern District of New York
Sir:

You are hereby notified that I appear for Paul Wolf and Max Bornstein, the defendants in the above-entitled action.

Dated: New York,

HAROLD PRICE FAHRINGER
Attorney for Defendant

(Title of Cause)

To: John Livingston, Clerk, United States District Court, Southern District of New York
Sir:

You are hereby notified that I appear for Edward Alexander and Ferris Alexander, the defendants in the above-entitled action.

Dated: New York, New York.

KEITH D. KENNEDY
Attorney for Defendant
1115 Plymouth Building
Minneapolis, Minnesota

The Court: I will reserve decision on the rest of your demands.

Mr. Wallach: Just one more motion and I will be brief.

Under Rule 16(b) my motion is academic. The government consented to let us examine the materials involved.

The Court: You consent to that, do you?

Mr. Blommer: I consent to everything that the defendant Cacace has asked for, Your Honor.

The Court: Then the motion is granted on consent as to you.

Mr. Wallach: Thank you, Your Honor.

Mr. Fehringer: If it please Your Honor, I represent Paul Wolf, Max Bornstein and Edward and Ferris Alexander, and I want to advise the Court that the Alexander brothers are from Minneapolis and I was acting here as local counsel for their attorney in Minneapolis, who was admitted to the hospital a couple of weeks ago, and he asked me if I would be kind enough to file motions on their behalf.

I anticipate that Mr. Keith Kennedy, of Minneapolis, will be available to try this case at the time.

As to Max Bornstein, Your Honor, I am arguing the motion on his behalf, but I have indicated to him—and I will make these arrangements—that he will have to have counsel in advance of trial to handle the case for him, because of a possible conflict of interest.

If that is permissible, Your Honor, I will proceed on that basis.

The Court: All right.

Mr. Fehringer: If Your Honor please, I am going to conserve your time because I know you have heard a great deal today from the lawyers, and much of what I have to discuss with the Court has already been resolved.

May I just simply make this statement to the Court on the subject of statements because I would like there not to be any confusion about this.

I feel that we are entitled to know, when a statement was made by a defendant, whether or not the government intends to use it because if it was illegally obtained there is a possibility of course that there were leads obtained from this statement which, it seems to me, we have a right then to investigate under the doctrine of the fruit of the forbidden tree.

So that my request here is manifestly fair. I feel that I am entitled to know about and see statements of all of the defendants that may have been made, either

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(Title of Cause)

To: John Livingston, Clerk, United States District Court, Southern District of New York.

Sir:

You are hereby notified that I appear for Max Bornstein, the defendant in the above entitled action.

Dated: New York, New York.

MELVIN N. FINE
Attorney for Defendant
24 Church Street
Paterson, N. J. 07505
(201) MU4-1138

September 20, 1970

Hon. Lloyd MacMahon
United States District Court
for the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: *United States v. Manrite, et al.*

Dear Judge MacMahon,

I regret informing you that for the past month I have been trying to contact Paul Wolf, whom I originally appeared for in the above-entitled prosecution. I also temporarily appeared for Max Bornsten while he was seeking other counsel. I had always advised him that he would have to have counsel of his own; however, I felt an obligation to make sure he had secured independent counsel. I have not been able to contact either of these men. They no longer live at the addresses that I had for them, their telephones have been disconnected, and they have left no forwarding addresses. I am now fearful that they will not appear on August 5th, and I felt that I should immediately inform you of this.

I would be most happy to sit down and discuss this matter with you, if you felt that it would be helpful in any way.

Yours vey truly,
LIPSITZ, GREEN,
FAHRINGER, ROLL,
SCHULLER & JAMES
By Herald Price Fahringer

September 26, 1970

Hon. Lloyd MacMahon
United States District Court for
the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: *United States v. Manarite, et al. Max Bornstein.*

Dear Judge MacMahon,

I was finally able to reach Max Bornstein and reminded him that he would have to have counsel of his own on October 5th when the above-entitled matter goes to trial. He acknowledged to me that he remembered that my appearance for him was only temporary and that he had been told that he would have to have counsel of his own at the time of October 5th. He plans to obtain counsel and be ready to go to trial on October 5th.

I have still not been able to locate Paul Wolf and have not heard from him, and I am afraid that he may not appear on October 5th.

In the meantime, Edward and Ferris Alexander have asked me to represent them and I plan to proceed to trial on October 5th as attorney for the Alexanders.

Respectfully yours,
HERALD PRICE FAHRINGER

Mr. Scott: We have prepared 8 copies. I believe that should be sufficient.

The Court: I think so. I think that is ample.

Mr. Wall: I don't have anything more.

Mr. Fahringer: Your Honor, may I bother you again? I have with me Mr. Melavitz from Minneapolis. He would like to appear with me as co-counsel. He represents Mr. Alexander out in Minneapolis.

I would like to move his admission for the purposes of this case. He is a member of the bar of the District Court of Minnesota, and the 8th Circuit Court of Appeals, together with, of course, the State Bar of Minnesota.

The Court: Motion granted.

Mr. Fahringer: May I just bring up one other matter that I would like to alert the Court to. We have in these supplemental bill of particulars which have been supplied to us that certain of the defendants have cooperated with the government and will be cooperating with the government.

Under the well-known Hoffa case and the Lewis case, the United States Supreme Court spoke about government informants and approved. But there is language in these cases that I feel an obligation to bring to the Court's attention in terms of protecting our record here.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FERRIS JACOB ALEXANDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
PURSUANT TO 28 USC SEC. 2255
72 Civ. 248

ROBERT J. MILAVETZ, being first duly sworn, deposes and says that:

1. I am an attorney and have assisted Harold Fahringer in the representation of Ferris J. Alexander throughout the trial of the above entitled matter.

2. I have conferred with Mr. Harold Fahringer, Ferris Alexander and Edward Alexander and I am familiar with facts pertaining thereto.

3. That this affidavit is submitted in support of the motion of defendant, Ferris J. Alexander, pursuant to 28 USC Section 2255 sworn to on January 19, 1972.

4. That Harold Price Fahringer has in fact represented Paul Wolf, Max Bournstein, Ferris Jacob Alexander and Edward Jacob Alexander. Exhibit A attached hereto and incorporated herein by reference.

5. That perhaps originally Harold Fahringer only intended to represent either Paul Wolf or Max Bournstein but when it appeared that Paul Wolf would not appear at the trial and that Max Bournstein had little in the way of funds, Harold Fahr-

inger agreed that he would represent Ferris and Edward Alexander.

6. That testimony would show that Harold Fahringer received retainers from both Ferris J. Alexander and Edward J. Alexander.

7. That at the commencement of the trial, Harold Fahringer continued to represent Edward J. Alexander and after the court granted the motion to sever Edward J. Alexander, Harold Fahringer stated on behalf of Edward Jacob Alexander, "May he also leave the courtroom and be continued on bail?" See Exhibit B attached herewith and incorporated herein by reference.

8. That Mr. Fahringer was not relieved from his duty to represent Max Bournstein until the time of the trial. See Exhibit C attached herewith and incorporated herein by reference.

9. That Mr. Fahringer has continued to represent Edward Alexander at least until the beginning of the year, 1972 when he filed a motion to dismiss the indictment against Edward Jacob Alexander herein. Copy Exhibit D attached herewith and incorporated herein by reference.

10. That although Harold Fahringer stated that he would only represent one of the Alexanders at the time of the trial he also represented that he would be in charge of both of their defenses.

11. The Government should not attempt to confuse the Court with the allegation that, "There is nowhere in the record an indication that Mr. Kennedy withdrew from the case." Mr. Kennedy never appeared at the trial. The fact that Mr. Kennedy represented either Ferris or Edward Alexander in the past is not relevant. Neither is it relevant that other counsel may have had conflicts of interest. It is apparent, however,

that the Government does not understand petitioner's allegations. Petitioner does not allege that there is necessarily a conflict of interest. On the other hand, simply because an attorney is only appearing with one defendant during a trial does not mean that there is no conflict of interest.

12. Petitioner alleges that there was a conflict of interest in this case because of two facts. A) Harold Fahringer had a dual loyalty to Ferris Alexander and his other clients, Paul Wolf, Max Bournstein and Edward Alexander. B) The dual loyalty interfered with Fahringer's ability to make decisions.

13. Fahringer had to consider whether or not to allow Edward Alexander to testify for his brother Ferris Alexander as Ferris had requested of him. Fahringer had to consider the extent of his cross-examination of the Government witnesses such as Bruce Valentine who alleged that he met Ferris Alexander in New York and in Minneapolis, Minnesota and the lady from the bank in Minneapolis who alleged that she had sold money orders to Ferris Alexander.

14. Harold Fahringer had to consider whether or not to confront these witnesses with Edward Alexander and what effect this would not only have on Ferris's case but what effect this would have on the possibility of Edward Alexander being tried. During the course of the trial, a mistrial was declared and again Harold Fahringer had to consider whether or not Paul Wolf might return and be tried in a new trial or go ahead on the same possibly contaminated jury. Fahringer waived without first conferring with petitioner. Fahringer had to consider whether or not Ferris Alexander should testify knowing that Ferris Alexander would have to testify that he did know Paul Wolf and Max Bournstein. He had to consider what effect this would have on their cases.

15. Petitioner alleges that these are questions not of trial strategy. Petitioner alleges that Fahringer could not make these decisions and other decisions objectively because he was fettered by his duties to his other clients.

16. The fact that Fahringer disclosed to the court that he may have a conflict of interest in representing Paul Wolf and Max Bournstein is of no moment to Petitioner's case. Perhaps even it should have pointed the need for the Court to make inquiry directly with Ferris Alexander. When it became apparent during the course of the trial that Fahringer would have to make certain decisions as to the extent of his cross-examination of Government witnesses, as to whether or not witnesses should be called and as to whether or not Ferris Alexander should testify, Fahrlinger should have disclosed his conflict to the Court. The Court could have then appointed another attorney to confer with Ferris Alexander and another attorney perhaps to confer with Edward Alexander.

17. Fahringer's conflict shackled him to such an extent that he could not even inquire of Edward Alexander as to what his testimony would be if he were called to testify on behalf of Ferris Alexander. Fahringer did advise Edward Alexander, however, not to testify and not to be available for a subpoena.

18. Regardless of the amount of documentary evidence alleged by the Government to be against petitioner, petitioner's Sixth Amendment right to adequate, effective assistance of counsel is not diminished. Defendant Ferris Alexander was entitled to counsel who was unhindered with any duty to protect any other persons. The greater the evidence against petitioner, the more compelling was petitioner's need for effective assistance of counsel.

FURTHER YOUR AFFIANT SAYETH NOT, save he makes this affidavit in support of a motion for a hearing pursuant to 28 USC Section 2255.

ROBERT J. MILAVETZ

Subscribed and sworn to before me this ..... day of February, 1972. — ....., Notary Public.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

SAMUEL S MANARITE, et al.,
PAUL WOLF, MAX BORNSTEIN,
FERRIS JACOB ALEXANDER and
EDWARD JACOB ALEXANDER,
Defendants

NOTICE OF MOTION

Indctment No.
69 Cr. 747

Sir:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Herald Price Fahringer duly sworn to on the 28th day of February, 1970, and upon the indictment and all the other proceedings heretofore had herein, the undersigned will move this Court on behalf of the defendants, Paul Wolf, Max Bornstein, Ferris Jacob Alexander and Edward Jacob Alexander, at a Criminal Term for Motions to be held in the Federal Court-

house located at Foley Square, Borough of Manhattan, State of New York, for the following relief:

1) For an order directing certain discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure;

2) For an order requiring the Government to produce and deliver to the defendants all evidence favorable to them under the authority of *Brady v. Maryland*, 373 U.S. 83.

3) For an order suppressing any statements made by the defendants or in the alternative a hearing be conducted to determine the constitutional propriety of such statements pursuant to *Miranda v. Arizona*, 384 U.S. 436, and other related cases.

4) For an order suppressing certain evidence unlawfully seized from the defendants or in the alternative an order directing a hearing be conducted to determine all relevant issues connected with defendants' claims that certain evidence was seized from them unlawfully, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure;

5) For an order dismissing the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure;

6) For an order dismissing the indictment on the grounds that Section 1465 of Title 18 is unconstitutional, and an order so declaring that section to be unconstitutional, and further dismissing the indictment on the grounds that the Court has no jurisdiction to try such an indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure;

7) For an order granting inspection of the Grand Jury Minutes pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure;

8) For an order granting a Bill of Particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure;

9) For an order granting a severance and separate trials for these defendants under Rule 14 of the Federal Rules of Criminal Procedure;

10) That this Court grant such other and further relief as is just under all of the circumstances of this case.

Dated: Buffalo, New York, February 28th, 1970.

Yours, etc.,
HERALD PRICE FAHRINGER
Attorneys for Defendants,
Paul Wolf, Max Bornstein,
Ferris Jacob Alexander and
Edward Jacob Alexander
Office & P.O. Address
One Niagara Square
Buffalo, New York 14202

To: STEPHEN SCOTT
Asst. United States Attorney
Department of Justice
Federal Plaza
New York, New York

PATRICK M. WALL, ESQ.,
Attorney for Defendant Luis Marti.
JAMES M. LA ROSSA, ESQ.,
Attorney for Defendants Richard J. Portola
and Carol Ann Portola.
MICHAEL P. DIRENZO, ESQ.,
Attorney for Defendant Dominick Constantine.
VICTOR A. ROBERTS, ESQ.,
Attorney for Defendant Phil Primet.

HOWARD L. JACOBS, ESQ.,
Attorney for Defendant Frank J. Del Rosso, Jr.
MILTON ADLER, ESQ.,
Attorney for Defendant Salvatore Puntasecca.
By: John P. Curley, Jr., Esq., of Counsel.
MELVIN M. FINE, ESQ., and
KALMAN, HARRIS & CEIST, ESQS.,
Attorneys for Defendant Max Bornstein.
ARNOLD E. WALLACH, ESQ.
Attorney for Defendant Vinny Cacace.
HERALD PRICE FAHRINGER, ESQ., and
ROBERT MILAVETZ, ESQ.
Attorneys for Defendants Ferris Jacob Alexander and Edward Jacob Alexander.
Also Present:
Abraham H. Brodsky, Esq.

One could argue that the Court was referring strictly to a written statement, but this is not what the Court said in its opinion. Mr. Kelly apparently is charged as a co-conspirator and is cooperating with the government and the government has indicated they intended to name him. With that in mind and the fact that in the short time I have had available, it appears to me that numerous of the co-defendants may have, and, in fact, from the discovery ordered by the Court, given by the government, numerous acts of co-defendants which could prejudice Mr. Bornstein in the eyes of the jury, and if he were to be tried with these co-defendants and have the co-defendant Kelly testify against him and others, his case could and very probably would be tainted by the balance of the tes-

timony, and I think it would be a miscarriage of justice as to Mr. Bornstein to force me on at this time and not to sever his case. I would like a ruling on this motion. I have other motions.

Mr. Scott: I have a notice of appearance by Mr. Fine just recently. However, I have in my files a notice of appearance for Mr. Bornstein filed by Mr. Fahringer. There is no date on it, but it was way back at the time this case was initiated, at the time of the arraignment. Mr. Fine simply filed his just a week or so ago, and the government opposes any motion for severance for that reason. If he was going to be the attorney of record he could have filed a notice of appearance months earlier. Mr. Fahringer, as far as we were concerned, was the attorney of record for Mr. Bornstein.

The Court: My recollection is Mr. Fahringer wrote the Court a letter asking to be relieved and I denied it on the ground that it came too late.

Mr. Scott: I did not receive a copy of the letter. I have a notice of appearance filed by Mr. Fahringer and have no withdrawal from him.

The Court: I will deny the motion.

What about the motion to sever?

Mr. Scott: The reasons given at that time were the Bruton problems. The government opposes the motion to sever on the ground there would be no Bruton problem here. If any statements of co-conspirators are used against the defendant Bornstein, no Bruton problem will exist.

The Court: I deny that motion at this time, again without prejudice to renew when, as and if the problem arises.

Does the government have any motions?

Mr. Scott: The government has no motions to make. It is my understanding the defendant Paul Wolf is not in court today. I would like to verify that?

Mr. Fahringer: I also wrote you a letter—I think it was two to three weeks ago—where I had advised that we had been unable to reach Mr. Wolf and I advised the Court today that he is not in court and I do not know where he is.

Mr. Scott: In view of that the government moves at this time for forfeiture of Mr. Wolf's bail and makes application for a bench warrant.

The Court: Motion granted.

Mr. Scott: The government moves for a severance of Mr. Wolf in this case.

The Court: Motion granted.

Mr. Scott: The government moves for a severance of the defendants Phil Primet, Frank J. Del Rosso, Jr., James Kelly, Edward Jacob Alexander, and Vinny Caccace.

Mr. Wallach: I don't mean to be rude, but I represent Caccace, I am his attorney. It comes as a surprise to me. I understand the government wishes to sever as to Caccace?

The Court: Yes, that is what the motion is.

Mr. Wallach: I made such a motion before. I certainly can't oppose that on behalf of Caccace.

The Court: Motion granted.

Mr. Scott: As to the other defendants, your Honor?

The Court: As to all you mentioned.

Mr. Wallach: May Mr. Caccace then leave the courtroom, and may his parole be continued?

The Court: Yes.

Mr. Fahringer: On behalf of Edward Jacob Alexander, may he also leave the courtroom and be continued on his bail?

The Court: Yes.

Mr. Wallach: I submitted a request under Rule 2423 as to the jury. I no longer have need of that, but I showed it to co-counsel, and I assume that any application made by one defendant will inure to all. So I leave that with your Honor and counsel.

The Court: Do you have any other application?

Mr. Scott: The government respectfully requests that Mr. James McShane of the Federal Bureau of Investigation be permitted to sit at counsel table during the course of this trial. This is a very complicated conspiracy with numerous defendants. Mr. McShane is the agent in charge of the investigation. He will be testifying, your Honor. However, we do not believe that there will be any prejudice to the defendants by his being at counsel table and I respectfully request that.

The Court: Can you give us some indication without prejudicing your case what the nature of his testimony will be?

Feb. 14, 1972

"The files and records of this Court show beyond preadventure that Harald Price Fahringer, Esq., did not represent Ferris Jacob Alexander in any real sense upon the trial until he had ceased to represent other defendants. Additionally, Robert J. Milavetz, Esq., represented Ferris Jacob Alexander throughout the trial. The record is plain that on the trial proper Mr. Fahringer represented only Ferris Jacob Alexander. The supporting affidavit of James M. LaRossa, Esq., who has since withdrawn from this application because "the manner in which Mr. Alexander seeks to secure habeas corpus relief is wholly incompatible with my own standands of professional responsibility," and the affidavit of Mr. Milavetz, wholly fails to show any facts pointing to any specific instance of prejudice or real conflict of interest. In short, this application is frivolous and is therefore denied without a hearing. 28 USC 2255. *United States v. Lovano*, 420 F. 2d 769 (2 Cir.), cert. denied, 397 U.S.

1071 (1970). *Hussey v. LaVallee*, 428 F. 2d 457 (2 Cir. 1970), cert. denied, 460 U.S. 995 (1971).

So Ordered.

LLOYD F. MacMAHON
U. S. D. J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of April, one thousand nine hundred and seventy-two.

Present: Hon. Henry J. Friendly, Chief Judge; Hon. J. Joseph Smith, Hon. James L. Oakes, Circuit Judges.

FERRIS JACOB ALEXANDER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

(A true copy — A. Daniel Fusaro, Clerk.)